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JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

AMERICAN AND BRITISH CLAIMS ARBITRATION TRIBUNAL¹

[Arbitrators: HENRI FROMAGEOT, SIR CHARLES FITZPATRICK, CHANDLER
P. ANDERSON]

IN THE MATTER OF THE FAVOURITE

CLAIM No. 12

Decision rendered December 9, 1921

This is a claim for \$19,443.28 together with interest from November 30, 1894, presented by His Britannic Majesty's Government on behalf of Laughlin McLean, for damages arising out of the seizure of the British sealing schooner *Favourite* by the United States Revenue Cutter *Mohican* on August 24, 1894, and her subsequent detention.

The *Favourite* was a British schooner registered at the Port of Victoria, and her owner was Laughlin McLean, a British subject and master mariner. In 1894, R. P. Rithets and Company, Limited Liability, a body incorporated under the laws of British Columbia, and managers of the said schooner, fitted the vessel out for a sealing voyage.

After procuring a special sealing license, the vessel, manned by Laughlin McLean as master, and a crew of eight men, sailed from Victoria on June 18, 1894. When the vessel sailed from Victoria, she had on board no fire-arms except one double-barrel shotgun, the barrels of which had been cut off to about eleven inches. The presence of this gun was noted on the ship's manifest. The vessel proceeded to Kyuquot on Vancouver Island, where a crew of forty-five Indian hunters was procured.

After the sealing implements on board had been sealed by Her Majesty's Customs Officers and entry made in her log book, the vessel set sail for Behring Sea on July 4, 1894; entered that sea on August 1st; and after breaking the seals on the implements commenced sealing and continued sealing until August 24, 1894. On that date when in longitude 168.30, latitude 54.27, the vessel was boarded and searched by an officer of the United States Revenue Cutter *Mohican*, who made the following entry in the ship's log:

Boarded the 'Favourite.' Found log correctly kept. No violations of regulations, as per log; one shotgun unsealed.

¹ Previous decisions of this Tribunal are printed in this Journal, Vol. 13, pp. 875, 890; Vol. 14, pp. 650-66; Vol. 15, pp. 292-304; Vol. 16, pp. 106-116.

The officer then left the *Favourite*, but returned shortly thereafter and directed the master to go on board the *Mohican*, bringing with him all his papers and the gun, with which direction the master complied. The gun was fired and found to shoot very accurately for a distance of fifty yards. Whereupon the master was informed that the vessel was under seizure, for the following reasons, which are stated in the declaration of seizure:

. . . for violation of article six (6) of the Award of the Tribunal of Arbitration and of that part of section ten (10) of the Act of Congress approved April 6, 1894, which reads:

‘. . . or if any licensed vessel shall be found in the waters to which this act applies, having on board apparatus or implements for taking seals, but forbidden then and there to be used, it shall be presumed that the vessel in the one case and the apparatus or implements in the other was or were used in violation of this act until it is otherwise sufficiently proved.’ (United States Answer, Exhibit 4.)

On August 30, 1894, the Commander of the United States Naval Forces in Behring Sea sent a report to the Secretary of the Navy, in which he stated—

It is more than likely that the shotgun for which the vessel was seized was intended to be used in projecting signal stars, as the barrels were cut off, reducing them to a length of about twelve inches, but it was found after trial, that it could be used to kill seals much beyond the ordinary range of spear throwing.

But whether this was the only intention, or whether there was another to use it for killing seals in case it was allowed for signal purposes, I am not prepared to say; but its possession is clearly in violation of the provisions contained in sec. 10 of the Act of Congress approved April 6, 1894. (United States Answer, Exhibit 7.)

To this report were annexed the reports of the officers of the *Mohican* with reference to the seizure of this vessel.

The *Favourite* was immediately sent in the custody of a prize crew from the *Mohican* to Unalaska, and on August 27th was delivered to the commanding officer of the British cruiser *Pheasant* at Unalaska, who ordered the *Favourite* to report to the Collector of Customs at Victoria, B.C.

Upon her arrival at Victoria, the *Favourite* was released by order of Rear Admiral Stevenson, the British Naval Commander in Chief on the Pacific Station.

The Government of His Britannic Majesty contend that the seizure of the *Favourite* was illegal and unjustifiable, as neither the Behring Sea Award, nor the regulation made therein or thereunder, nor any legislation or other legal or competent authority, justified or authorized the seizure of the vessel in the circumstances.

The United States Government, on the other hand, denies all liability; first, because its officers were acting on behalf of the British Government and not of the United States Government; second, because there was the

bona fide belief that an infraction of the Behring Sea Award Act, 1894, had been committed; third, because the release of the *Favourite* by the British naval authorities without a regular prosecution before a court rendered it impossible to determine in the only competent way whether the seizure was illegal; fourth, because, even supposing the seizure was made without probable cause, the liability to pay damages would rest upon His Britannic Majesty's Government; fifth, because the detention of the vessel from and after August 27, 1894, the date of its delivery to the commanding officer of the British cruiser *Pheasant* at Unalaska, was due to the action of the British authorities; and sixth, because there is no basis in law or in fact for the measure of damages claimed.

I. As to the legality of the seizure and liability of the United States:

On the facts in this case, and for the reasons stated in the award of this Tribunal in the case of the *Wanderer*, Claim No. 13, delivered December 9, 1921, this Tribunal holds:

(1) That the seizure of the British ship *Favourite* by United States officers under section 10 of the Act of Congress approved April 6, 1894, was an improper exercise of the authority conferred upon them by the British Government under the Behring Sea Award Act of 1894, and the order-in-council of April 30, 1894;

(2) That the good faith of the United States naval officers is not questioned, their error in judgment being caused by the provisions of the afore-said section 10, for which section and the error of judgment committed by its agents thereunder, the United States Government is liable;

(3) That inasmuch as the offence of the *Favourite* did not make her liable to forfeiture, the British Government were under no international or legal duty to proceed against the ship through their Admiralty Courts, and not to release her by a merely administrative decision; and

(4) That the British authorities, rather than the United States authorities were responsible for the detention of the ship after she was delivered to them on August 27th.

The United States Government, therefore, is liable only for the three days of her detention, namely from August 24th to August 27th, during which she was under the control of officers of the United States, and the three additional days which should be allowed for the vessel to return to the sealing grounds if she had been released at Unalaska on August 27th.

II. As to the amount of damages:

The damages claimed on behalf of the claimant, amounting to \$19,443.28, as set forth in the British Memorial, are based upon "a reasonable estimate of the sums which the owners would have received as the proceeds of the voyage, if it had been completed, together with interest thereon," or, in the alternative, the said amount is claimed "by reason of the loss of time,

wages, provisions and outfit for the remainder of the season after the 24th of August, 1894."

It is shown in the British Memorial that during the period between August 1st and August 24th, the *Favourite* had taken 1247 seal skins, the net value of which, as shown by their sale in London was at the rate of \$8.62 per skin. This would make the average daily catch 52 skins, equivalent to \$448.24 in value. It does not necessarily follow that the *Favourite* would have continued to take seal skins at this daily average during the remainder of her voyage, but the Tribunal is of the opinion that in view of her hunting equipment consisting of nineteen canoes and forty-five Indian hunters and a crew of eight white men, an estimated allowance of 52 skins per day as an average is not excessive. The Tribunal, therefore, considers that the prospective profits for these six days should be estimated at \$448 per day, making \$2,688 in all, and fixes this amount as damages for her loss of profits with \$500 additional for the trouble occasioned by her illegal detention.

As to interest:

The British government in their oral argument admit that the 7 per cent interest claimed in their memorial must be reduced to 4 per cent in conformity with the provisions of the Terms of Submission.

It appears from a letter addressed by the Marquis of Salisbury to the British Ambassador in Washington on August 16, 1895, and handed by him to the Secretary of State of the United States on September 6, 1895, that this was the first presentation of a claim for compensation in this case. Therefore, in accordance with the Terms of Submission, section IV, the Tribunal is of the opinion that interest should be allowed at 4 per cent from September 6, 1895, to April 26, 1912, on \$2,688 damages allowed for loss of profits.

FOR THESE REASONS

This Tribunal decides that the Government of the United States shall pay to the Government of His Britannic Majesty, on behalf of the claimants, the sum of Three thousand one hundred and eighty-eight dollars (\$3,188) with interest on Two thousand six hundred and eighty-eight dollars (\$2,688) thereof at four per cent (4%) from September 6, 1895, to April 26, 1912.

The President of the Tribunal,

HENRI FROMAGEOT.